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REPORT OF THE COMMISSIONER

OF THE GENERAL LAND OFFICE

FOR THE YEAR 1896

WASHINGTON, D. C.

THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 686

WALTER L. MARR, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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UNITED STATES COURT OF CLAIMS

No. C-12

WALTER L. MARR

versus

THE UNITED STATES.

PETITION—Filed January 23, 1923

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The Claimant, Walter L. Marr, files this his petition and respectfully alleges and shows the court as follows:

I. Claimant is a citizen of the United States of America and resides in Hamilton County, in the State of Tennessee. He has at all times borne true allegiance to the Government of the United States and has not, in any way, aided, abetted, or given encouragement to rebellion against said Government, or, at any time, aided or abetted, in any manner, or given comfort to any sovereign or government that is or has been at war with the Government of the United States.

[fol. 2] II. At the proper time in the year 1917 Claimant and his wife, who then resided in the State of Michigan, duly made a joint income tax return for the year 1916, and paid the taxes, shown by said return to be due to the Collector of Internal Revenue at Detroit.

III. On March 19, 1921, Claimant, who had then become a resident of the State of Tennessee, was notified that the Commissioner of Internal Revenue had made an additional assessment on the income of himself and wife for the year 1916 and that additional taxes to the amount of \$23,098.40 were demanded of him. Claimant filed with the Commissioner of Internal Revenue a claim in abatement based on the grounds which will be hereinafter recited. On December 29, 1921, Claimant was notified by the Internal Revenue Collector at Nashville that said claim had been disallowed and that demand was made for payment of said assessment and interest, aggregating \$24,944.12. And, on January 7, 1922, Claimant paid this amount to said Collector under protest and to avoid the seizure and sale of his property. After paying said taxes under protest, Claimant made his appeal to the Commissioner of Internal Revenue according to the provisions of the law and the regulations of the Secretary of the Treasury in pursuance thereof, by filing, on March [fol. 3] 29, 1922, a claim for the refund of said taxes. Said appeal and claim have been considered by the Commissioner and a decision made by him refusing and disallowing said claim.

IV. Said additional assessment is based on the theory that Claimant and his wife derived income from a single transaction in 1916 in which they exchanged certain shares of stock of the General Motors Company, a corporation under the laws of New Jersey, and hereinafter called the New Jersey corporation, for shares of the stock of the General Motors Corporation, a corporation under the laws of Delaware, and hereinafter called the Delaware corporation.

The transaction culminating in said exchange of stock was as follows:

(1) The New Jersey corporation had outstanding \$15,000,000.00 of 7 per cent preferred stock and \$15,000,000.00 of common stock of the par value of \$100.00 per share. It had accumulated a large surplus so that the actual value of its common stock was in excess of \$500.00 per share.

(2) In 1916 a reorganization was determined upon, and the Delaware corporation was organized for the purpose of taking over [fol. 4] and continuing the business of the New Jersey corporation. Its authorized capital was \$20,000,000.00 of 6 per cent preferred stock and \$80,000,000.00 of common stock of the par value of \$100.00 per share.

(3) Upon being organized, the Delaware corporation proposed to the stockholders of the New Jersey Corporation to exchange for each share of the 7 per cent preferred stock of the New Jersey corporation one and one-third shares of its own 6 per cent preferred stock and, for each share of the common stock of the New Jersey corporation, five shares of its own common stock. This offer was accepted by all the stockholders and the exchange made except in the case of the holders of a few shares of preferred stock, which were redeemed or paid off in cash. The Delaware corporation thus became the owner of all the outstanding stock of the New Jersey corporation.

(4) Under a proper proceeding for that purpose, the New Jersey corporation was dissolved and its assets and liabilities transferred to the Delaware company, the holder of all its stock.

(5) When the transaction was completed, the Delaware corporation had no outstanding stock except that which had been issued in exchange for stock of the New Jersey corporation. It had no assets except those transferred from that company and its liabilities were only those which had been the liabilities of that company.

[fol. 5] (6) After the exchange the market value of the Delaware corporation's stock was, preferred \$94.6875, and common \$168.50 per share.

VI. Claimant and his wife owned 339 shares of preferred and 425 shares of common stock of the New Jersey corporation, making a total of 764 shares, which had been acquired at a cost of \$76,400.00, all of which were exchanged. What they received in exchange, at the market price, had a value of \$400,866.57. The additional assessment was made on the theory that the difference between these

amounts, or \$334,466.57, was taxable income. The result was an additional tax of \$23,096.40, which, with interest, was paid by claimant, under protest as hereinbefore shown.

VII. Claimant now shows that said additional taxes were wrongfully and illegally assessed and collected.

Said assessment was based on the Revenue Act of 1916, 39 Stat., ch. 463, pp. 765 et seq., section 1 of which imposes a tax on net income received from all sources. And section 2 (a) defines net income as

gains, profits, and incomes derived from salaries, wages, or compensation [fol. 6] for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit and income derived from any source whatever.

But, claimant shows that no gain, profit, or income was derived from said exchange of stocks.

There was, in fact, no disposition of property, but a mere acquiescence in a change of the evidence of title by which the same property interest continued to be held.

The effect of the taking over by the one corporation of the assets, liabilities, and business of the other was nothing more than a change of domicile by the latter, and the shares of the new company received represented the same property interest which the surrendered shares of the old had represented.

Claimant and his wife received nothing separate and distinct, or readily severable from, their capital. Before the exchange, their shares of the old company represented their investment with the added increment of value which had accrued to it, but had not been [fol. 7] derived or separated from it. After the exchange, their larger number of shares of the new company represented the same investment with the same added increment of value which was equally underived and unseparated from the investment.

Since there was, in fact, no income derived from the exchange, the Act of Congress does not purport to authorize the assessment as made, or, if it does, it is, to that extent, unconstitutional and void.

VIII. No action upon this claim has been taken other than herein set forth before Congress or any department of the Government or in any court.

IX. Petitioner, Walter L. Marr, avers that, by reason of the facts hereinbefore set out, there is now justly due and owing to him by the United States the said sum of \$24,944.12 with interest from January 7, 1922, and that he is the sole owner of the claim herein sued upon and that no assignment or transfer of the said claim, or any part thereof, or any interest therein has been made. Where-

fore, Petitioner prays for judgment against the United States for \$24,944.12 with interest from January 7, 1922.

Walter L. Marr. Williams & Frierson, Attorneys for Petitioner.

[fol. 8] Jurat showing the foregoing was duly sworn to by Walter L. Marr omitted in printing.

[fol. 9] II. GENERAL TRAVERSE—Entered March 26, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. ARGUMENT AND SUBMISSION OF CASE

On November 12, 1923, the case was argued by Mr. William L. Frierson, for the plaintiff.

On November 13, 1923, the case was argued by Mr. Frierson, for the plaintiff, and by Mr. C. A. Gwinn, for the defendant, and the case was submitted.

[fol. 10] IV. Findings of Fact, Conclusion of Law, and Memorandum by the Court—Entered November 21, 1923

This case having been heard and submitted upon a stipulation of facts signed by Assistant Attorney General Robert H. Lovett on behalf of the United States, and by Messrs. Williams and Frierson, attorneys for the plaintiff, on behalf of the plaintiff, the court, upon the said stipulation, makes the following

FINDINGS OF FACT

I. During the year 1916, the plaintiff, W. L. Marr, and his wife were residents of the State of Michigan. At the proper time they made a joint income tax return and paid the taxes shown by said return to be due to the collector of internal revenue at Detroit.

II. On March 19, 1921, the plaintiff was notified that the Commissioner of Internal Revenue had made an additional assessment against him for the year 1916 of \$23,098.40 and payment of the same was demanded. The plaintiff filed with the Commissioner of Internal Revenue a claim in abatement. On December 29, 1921, he was notified that this claim had been rejected and disallowed. The plaintiff having then become a resident of Tennessee, the assessment was sent to the collector of internal revenue at Nashville for collection and demand was made of plaintiff for the payment of said assessment

with interest, aggregating \$24,944.12, which amount he paid, under protest, on January 7, 1922.

Plaintiff then made his appeal to the Commissioner of Internal Revenue according to the provisions of the law and the regulations of the Secretary of the Treasury by filing a claim for the refund of said taxes and interest upon the grounds set out in the petition in [fol. 11] this cause. This claim, after consideration by the commissioner, has been refused and disallowed.

III. Said assessment was arrived at by adding to the net income shown by the original return the sum of \$324,466.57, upon the ground that that much income had been derived when, in 1916, plaintiff and his wife received 451 shares of the preferred and 2,125 shares of the common stock of General Motors Corporation, a corporation organized under the laws of Delaware and hereinafter called the Delaware corporation, and \$100 in cash in exchange for 339 shares of the preferred and 425 shares of the common stock of the General Motors Co., a corporation existing under the laws of New Jersey and hereinafter called the New Jersey corporation. The market value of the stock of the Delaware corporation so received was preferred \$94.6875 and common \$168.50 per share, making the total market value of the shares received \$400,766.57, and adding the \$100 received in cash makes the total value received \$400,866.57. The shares of the New Jersey corporation had been acquired at par, or a total cost of \$76,400. The difference between these amounts was treated as income, and this resulted in the assessment as made.

IV. The transaction culminating in said exchange of stock was as follows:

(1) The New Jersey corporation had outstanding \$15,000,000 of 7 per cent preferred stock and \$15,000,000 of common stock of the par value of \$100 per share. It had accumulated a large surplus, and the actual value of its common stock was, at the date of the exchange, \$842.50 per share.

(2) In 1916 the officers of the New Jersey corporation caused the Delaware corporation to be organized for the purpose of taking over and continuing the business of the New Jersey corporation. The authorized capital of the Delaware corporation was \$82,600,000 of common and \$20,000,000 of nonvoting preferred stock.

(3) The plan by which the Delaware corporation proposed to take over and continue the business of the New Jersey corporation was set forth in a letter addressed by 11 of the directors of the New Jersey corporation to its stockholders, which letter was as follows:

General Motors Company,
New York, October 16, 1916.

To the stockholders of General Motors Co.:

The undersigned members of the board of directors of your company, pursuant to the request of their associate directors and of

shareholders representing upwards of 70 per cent of the outstanding stock of the company present for your favorable consideration the following plan, the adoption of which in their opinion will afford the present stockholders of the company a more liquid and satisfactory [fol. 12] factory investment and eventually will lead to economies in administration to the benefit of all shareholders.

General Motors Corporation has been organized under the laws of Delaware, with an authorized capital stock of \$102,600,000, of which \$82,600,000 is common stock and \$20,000,000 is nonvoting preferred stock. The shares are of the par value of \$100 each. The preferred stock is entitled to receive cumulative dividends at the rate of 6 per cent per annum, and is subject to redemption, at the option of the company, at \$110 a share on November 1, 1918, or on any subsequent dividend-paying date. In the event of dissolution the preferred stock is preferred as to assets to the extent of its par value and accrued dividends.

General Motors Corporation of Delaware offers to the shareholders of General Motors Co. of New Jersey the privilege of exchanging their shares of stock for shares of the Delaware corporation on the following basis:

(a) One and one-third ($1\frac{1}{3}$) shares of preferred stock of the Delaware corporation for one (1) share of preferred stock of the New Jersey company.

(b) Five (5) shares of common stock of the Delaware corporation for one (1) share of common stock of the New Jersey company.

(Certificates for fractional shares will not be issued, but, in place thereof, the Delaware corporation will pay in cash at the rate of \$100 a share for its preferred stock and \$150 a share for its common stock.)

Every stockholder of General Motors Co. is extended the same privilege of exchange and on the same basis as has already been accepted by shareholders representing upward of 70 per cent of the outstanding stock of General Motors Co.

The plan is to become effective as of November 1, 1916, and all exchanges of stock under this offer will be made as of that date. Stockholders of the New Jersey company of record at the close of business October 14, 1916, will thus receive the dividend payable thereon by that company November 1, 1916. Dividends upon the preferred and common stock of the Delaware corporation will be computed from November 1, 1916, upon all of its stock issued and exchanged within the period hereinafter fixed for affecting such exchange.

Deposits for exchange are to be made with the Guaranty Trust Co. of New York, No. 140 Broadway, New York City, between October 16, 1916, and December 15, 1916, both dates inclusive. Upon the deposit of your certificates of stock of General Motors Co., of New Jersey, duly indorsed in blank (with New York State stock transfer tax stamps attached at the rate of 2 cents per share, or accompanied by an equivalent amount of cash), the Guaranty Trust

Co. will immediately cause to be issued and forwarded to you temporary certificates (pending the engraving of permanent certificates) for shares of stock of General Motors Corporation of Delaware, in accordance with the foregoing offer.

A form of acceptance of this offer to accompany your certificate of stock and to be signed by you is herewith inclosed, together with [fol. 13] a stamped envelope addressed to the Guaranty Trust Co. of New York.

Yours truly, A. H. Wiggin, C. H. Sabin, L. G. Kaufman, P. S. du Pont, W. S. Leland, C. S. Mott, J. H. McClement, J. J. Raskob, F. L. Belin, A. G. Bishop, W. C. Durant.

(4) This offer was accepted by all the holders of common stock and \$75,000,000 of the authorized \$82,600,000 common stock of the Delaware corporation was issued in exchange for the \$15,000,000 of outstanding stock of the New Jersey corporation.

The holders of all of the preferred stock of the New Jersey Corporation, except the holders of a few shares, also accepted the offer. The few shares mentioned were paid off or redeemed in cash and retired. In exchange for the shares of those who accepted the offer the Delaware corporation issued its own 6 per cent preferred stock at the rate of one and a third shares for one. But all fractional shares to which stockholders were thus entitled were paid in cash as provided in offer above set out.

The remaining \$7,600,000 of the authorized common stock of the Delaware corporation and such part of its authorized \$20,000,000 of preferred stock as was not thus issued in exchange for preferred stock of the New Jersey corporation, were either sold or held for sale as additional capital should be desired.

(5) The Delaware corporation having thus become the owner of all the outstanding stock of the New Jersey corporation caused the latter to be dissolved and all its assets and liabilities to be transferred to the Delaware corporation.

(6) The Delaware corporation continued the business of the New Jersey corporation. It had no assets except those transferred from the New Jersey corporation and such cash as had been realized by the sale of its own stock not used in acquiring the stock of the New Jersey corporation. And its liabilities were only those which had been the liabilities of the New Jersey corporation.

V. The plaintiff and his wife accepted the offer.

He had 15 shares of common and 11 shares of preferred stock of the New Jersey corporation. He received in exchange 75 shares of the common and 14 shares of the preferred stock of the Delaware corporation and \$66.67 in cash.

His wife had 410 shares of the common and 328 shares of the preferred stock of the New Jersey corporation. She received, in exchange 2,050 shares of the common and 437 shares of the preferred stock of the Delaware corporation, and \$33.33 in cash.

[fol. 14] VI. The plaintiff is a citizen of the United States and resides in Hamilton County in the State of Tennessee, has at all times borne true allegiance to the Government and has not aided, abetted, or given comfort to any enemy of the United States. He has not transferred or assigned the claim sued on or any part of it and no action has been taken on it except as stated in the petition.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

MEMORANDUM

The plaintiff exchanged stock in the New Jersey corporation for stock in the Delaware corporation on the basis of five shares for one. Preferred stock was exchanged on a different basis, but all of the preferred stock was not exchanged, and holders of that kind who declined to make the proposed exchange were paid in cash for their preferred stock. Having acquired all of the stock in the New Jersey corporation, the Delaware corporation caused all of the former's assets and liabilities to be transferred to itself and the New Jersey corporation to be dissolved.

The Delaware corporation had \$82,600,000 of common stock and used \$75,000,000 of it in acquiring the outstanding stock in the New Jersey corporation. It sold and realized cash for some of its stock in excess of that involved in the exchange. It thus had after the transfer all of the property the New Jersey corporation owned and some cash, realized, as stated, from its treasury stock.

Plainly the transactions involved two distinct entities, organized under the laws of different States, with different powers, and with different capital. Plaintiff exchanged his stock in one of these entities for stock in the other. This was an exchange of property.

When the exchange became effective we think that the plaintiff "in a legal sense realized his gain." *Cullinan v. Walker*, 262 U. S., 134; *Phellis case*, 257 U. S., 156; *Rockefeller case*, 257 U. S., 176.

[fol. 15]

V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Twenty-first day of November, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and it is ordered, adjudged and decreed that the plaintiff, as aforesaid, is not entitled to recover and shall not have

and recover any sum in this action of and against the United States; and that his petition be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the cost of printing the record in this court. No printing having been done by the court no costs are taxed.

By the Court.

VI. PLAINTIFF'S APPLICATION FOR AND ALLOWANCE OF APPEAL—
Filed Dec. 3, 1923

From the judgment in the above-entitled cause on the 21st day of November, 1923 in favor of the defendant, the claimant, through his attorneys, on the Third day of December, 1923, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Williams & Frierson, Attorneys.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

December 3, 1923.

[fol. 16] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and memorandum entered by the court; of the judgment of the court; of the application of plaintiff for an appeal to the Supreme Court of the United States and of the allowance of said appeal by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Third day of December, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,996. Court of Claims. Term No. 686. Walter L. Marr, appellant, vs. The United States. Filed December 7th, 1923. File No. 29,996.

(1285)